

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Accusation Seeking
Involuntary Reinstatement from Industrial
Disability Retirement of:

WLLIAM R. ANGLIN,

Respondent,

and

CALIFORNIA CORRECTIONAL
CENTER, SUSANVILLE CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Respondent.

Case No. 2010-0686

OAH No. 2014011025

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California on February 17, 2016.

John Shipley, Senior Staff Attorney, represented the California Public Employees' Retirement System, (CalPERS), State of California.

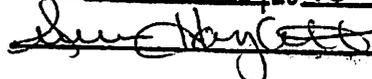
William R. Anglin (respondent) appeared and represented himself.

Respondent California Department of Corrections and Rehabilitation (CDCR), California Correctional Center-Susanville, did not appear.

Evidence was received and the matter was submitted on February 17, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED March 23, 2016



ISSUES

Did CalPERS prove that there exists sufficient medical evidence to conclude that, as a reasonable medical certainty, applicant is not substantially unable to perform his usual and customary duties as a CO for the CDCR due to the orthopedic condition of his left knee and low back, such that respondent should be returned to work?

CONTENTIONS

Respondent contends the continuing pain, swelling, popping and clicking he experiences in his left knee, and low back pain, render him unable to perform his duties as a CO. He contends his Worker's Compensation case found a 19.5 percent permanent disability due to the condition of his left knee, and his Worker's Compensation doctor precluded him from squatting, kneeling, crawling, prolonged standing, running, and walking on uneven surfaces. Respondent contends these medically imposed limitations incapacitate him and make him unable to perform his duties.

CalPERS contends there is no credible and persuasive medical evidence that applicant's left knee and/or his low back suffer from any substantially incapacitating medical condition or abnormality.

SUMMARY OF RESOLUTION OF CONTENTIONS

CalPERS successfully proved that the credible and persuasive medical evidence does not support a conclusion that respondent is substantially incapacitated from the performance of his duties as a CO with CDCR due to the orthopedic condition of his left knee or his low back, or both.

BURDEN OF PROOF

"As in ordinary civil actions, the party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion by a preponderance of the evidence."¹ "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."² Thus, CalPERS has the burden of proof and the burden of producing a preponderance of evidence in support of its claim that respondent

¹ *McCoy v. Board of Retirement* (1986) 183 Cal.App. 3d 1044, 1051.

² Evidence Code section 500.

is no longer substantially incapacitated, and thus entitled to a disability retirement.³ A preponderance of the evidence is that state of evidence where proof of the existence or nonexistence of a fact in dispute is more likely than not.⁴ Evidence that is deemed to preponderate must amount to "substantial evidence."⁵ Evidence must be reasonable in nature, credible, and of solid value in order to be "substantial."⁶ CalPERS has the burden of proving that respondent is no longer substantially incapacitated from the performance of his usual and customary duties in order to remove him from disability retirement.

FACTUAL FINDINGS

1. At all times relevant to this Decision, respondent was employed by CDCR, as a CO, assigned to the California Correctional Center, Susanville (CCC Susanville), Susanville, California.

2. Respondent was and is at all times relevant to this Decision a safety member of CalPERS by virtue of his employment with CDCR.

3. Respondent applied for industrial disability retirement from CalPERS on October 1, 2001. CalPERS approved the application after receiving medical information and reviewing the report of an orthopedic Independent Medical Examination (IME) performed by Jerry L. Roberts, M.D.

4. Respondent was officially retired for disability on July 11, 2002, but effective October 4, 2001. CalPERS determined based upon Dr. Roberts' IME, that the orthopedic condition of respondent's left knee rendered him substantially incapacitated from the performance of his duties.

5. Respondent wrote a description of his disability and limitations in his 2001 application to CalPERS for disability retirement. Respondent wrote that he was disabled due to "left knee patellofemoral syndrome, 7-2-99 I twisted my knee going down the stairs at work." Respondent wrote that he was restricted from climbing, squatting, kneeling, running, prolonged walking and standing, and prolonged sitting as a result of his injury. Respondent claimed to be permanently disabled because, "I cannot meet the physical demands of my job."

³ *Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689.

⁴ Evidence Code section 115.

⁵ *Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.

⁶ *In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.

6. Respondent was notified in writing by CalPERS on June 15, 2010, that CalPERS was reviewing his continuing eligibility for disability retirement as part of its periodic re-examination of persons receiving a disability retirement from CalPERS. CalPERS reviewed respondent's disability retirement status under the purview of Government Code section 21060, because respondent was beneath the minimum age for voluntary service retirement applicable to safety members when he was retired for disability.

7. Respondent was asked to provide information from his current and former treating physicians, a written statement regarding his current condition and report whether he was working, and, if so, the details of any employment. Respondent was also notified that he would be scheduled for an Independent Medical Examination (IME). Respondent submitted medical records and other documentation in response to the CalPERS request. Medical records respondent submitted were forwarded to Frank Minor, M.D., a Board certified Orthopedic Surgeon selected to perform the IME, for Dr. Minor's review and consideration in conducting the IME. Other medical records were presented by respondent at the hearing.

8. Dr. Minor performed an orthopedic IME on June 29, 2010, in Sacramento, California. Dr. Minor submitted a detailed written report of his IME findings and conclusions on June 29, 2010, to CalPERS' Benefit Services Division (BSD) staff for evaluation and review.

9. CalPERS' BSD staff re-reviewed the medical and other reports submitted by applicant, as well as Dr. Minor's IME findings and conclusions. CalPERS's BSD staff notified respondent in writing of the results of the BSD's reevaluation and review of respondent's qualifications for disability retirement on August 5, 2010. CalPERS's BSD staff advised respondent in writing that CalPERS determined that respondent was no longer substantially incapacitated from performing the job duties of a CO for the CDCR-CCC-Susanville due to his claim of orthopedic disability of his left knee. The notice also advised respondent that, in accordance with Government Code section 21192, he was being reinstated to his former position as a CO with CDCR. Respondent was also advised of his right to appeal the determination.

10. Respondent timely appealed CalPERS' BSD's determination in writing on August 25, 2010. Respondent wrote in his appeal that he is permanently disabled at 19.5 percent with his left knee injury, patellofemoral syndrome, which has progressively gotten more painful since his original diagnosis. Respondent also claimed that in addition to his left knee pain, he also has a substantial amount of pain in his hips and his back, which he stated to Dr. Minor at his evaluation on June 29, 2010. Respondent wrote, "I feel at this time I am not physically able to perform the duties of a correctional officer, due to all the continual pain and discomfort. I feel a more thorough physical examination to address all my pain and disabilities is needed."

11. Anthony Suine, Chief, CalPERS' BSD, made the allegations contained in the Accusation in his official capacity and caused it to be filed on January 30, 2014. Applicant

timely requested a hearing on the Accusation. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings.

Failures to Appear-Defaults

12. Notice of the date, time and place of the evidentiary hearing was duly given to respondent CDCR in accordance with the provisions of Government Code section 11505 and 11509. No appearance was made by or on behalf of respondent CDCR. The matter proceeded as a default only against respondent CDCR, pursuant to the provisions of Government Code section 11520.

Essential Functions of The Position

13. Exhibit 11 contains a CDCR form entitled "Division of Adult Institutions, Correctional Officer, Essential Functions (Essential Functions)." The Essential Functions requirements apply to all CO positions in CDCR adult facilities, regardless of location. The Essential Functions document was reviewed and signed by respondent's representative and representatives of CDCR and its Office of Personnel Services on August 28 and 29, 2008.

14. Most of the Essential Functions required of the incumbent CO are physical. There are some requirements in the Essential Functions that relate directly to the physical capacity of an incumbent's legs and/or lower back, such as:

Disarm, subdue and apply restraints to an inmate;

Defend himself against an inmate armed with a weapon;

Walk occasionally to continuously;

Run occasionally; run in an all-out effort while responding to alarms or serious incidents; distances vary from a few yards up to 400 yards; running may take place over varying surfaces including uneven grass, dirt areas, pavement, cement, etc.; running can include stairs or several flights of stairs maneuvering up or down;

Climb occasionally to frequently; ascend/descend or climb a series of steps/stairs, several tiers of stairs or ladders as well as climb onto bunks/beds while involved in cell searches; must be able to carry items while climbing stairs;

Crawl and crouch occasionally; crawl or crouch under an inmate's bed or restroom facility while involved in cell searches; crouch while firing a weapon or while involved in property searches;

Stand occasionally to continuously; stand continuously depending on the assignment;

Lift and carry continuously to frequently; lift and carry in the light (20 pound maximum) to medium (50 pound maximum) range frequently throughout the workday and in the very heavy lifting range (over 100 pounds) occasionally; lift and carry an inmate and physically restrain the inmate, including wrestling an inmate to the floor; drag/carry an inmate out of the cell; perform lifting/carrying activities while working in very cramped space;

Continuously wear equipment belt weighing 15 pounds;

Bracing occasionally; brace while restraining an inmate; during an altercation; while performing a body search;

Press occasionally; press with legs/feet while driving a vehicle; and

Perform regular duties on a wide range of working surfaces; which may become slippery due to weather or spillage of liquids and grease.

15. A CalPERS Physical Requirements of Position/Occupational Title statement (Physical Requirements), completed by applicant and a CDCR Return-to-Work Coordinator on May 10, 2010, is found at Exhibit 12. The Physical Requirements document reflects that a CO is physically required to frequently (between three and six hours per day) stand, walk, engage in simple grasping and repetitive use of hands, and walk on uneven ground. The CO is expected to occasionally (up to three hours per day) run, crawl, kneel, climb, squat, push and pull, lift and carry between 10 pounds and 75 pounds, drive, and work at heights.

16. Dr. Minor read and considered the Essential Functions and Physical Requirements statements during his IME. Dr. Minor used those Essential Functions and Physical Requirements descriptions as bases against which he assessed and formed his opinion whether applicant had the orthopedic capacity to substantially perform the requirements of a CO for CDCR at the time of his examination. Dr. Minor particularly focused his assessment on respondent's capacity to perform based upon respondent's complaints of continuing pain and disability of his left knee and low back.

Work History

17. Respondent's hire date by CDCR as a CO was not clear but was before 1998. He last worked for CDCR in 2000. Respondent has approximately five years of full-time service for CDCR. Respondent was 38 years old at the time of Dr. Minor's IME, well below the minimum eligibility age for safety retirement. All of applicant's work for CDCR as a CO

was at CCC-Susanville. Respondent worked generally supervising inmates, performing the general duties described in the Essential Function statement.

18. Respondent was retrained through the Worker's Compensation Vocational Rehabilitation system to be a construction site manager. Respondent started work as a construction site manager before CalPERS granted him the disability retirement at issue in this matter, and continued working after the benefit was awarded for several years. Respondent lost his job as a result of the building downturn in 2008 or 2009 and has not worked since.

Dr. Minor's IME Findings and Conclusions

19. Dr. Minor conducted a thorough clinical interview, including inquiry into respondent's past medical and health history, his description of his job duties and activities, work history and his explanation of the circumstances of his injury and subsequent treatment that led to his 2001 application for disability retirement. He asked about current and past medications, social history, personal habits, prior injuries and surgeries, work status, and personal circumstances. He took note of respondent's present complaints and concerns, which included persistent pain in his left knee with swelling and popping, aggravated by prolonged use. Respondent told Dr. Minor that he continues to experience pain and discomfort in his left knee, that his knee clicks and pops, and swells when he stands or walks for any significant period of time. Respondent contends that he is unable to run for any significant distance, and his Worker's Compensation preclusions of no repetitive squatting, kneeling, crawling, prolonged standing, running, and walking on uneven surfaces accurately reflect his current condition.

20. Dr. Minor reviewed a number of medical reports that described respondent's 1999 injury to his left knee and medical treatment for both his left knee and low back. Dr. Minor's review of medical reports focused upon Dr. Meadows' May 29, 2002 IME report that was the basis for granting of the industrial disability application in 2002 under review here, that of a report of a medical/legal evaluation performed by Mark Shelub, M.D., on March 15, 2001, and a single page Qualified or Agreed Medical Evaluator's Findings Summary Form completed by Wayne Inman, M.D., on June 23, 2001.

21. Dr. Minor conducted a comprehensive orthopedic physical examination as part of his IME. Dr. Minor diagnosed that respondent's left knee was "normal," and that he had complaints of low back pain. Dr. Minor found upon orthopedic physical examination only evidence of some age-related, normally occurring, early and minor signs of degenerative arthritis in respondent's left knee, nothing unusual that he would not expect to find on examination of a 38-year-old person's normal knee. He found upon orthopedic physical examination that respondent had normal strength, normal sensation, and slightly impaired range of motion in the left knee due to respondent's complaints of discomfort with the testing of the extent of his range of motion capacity. He found no orthopedic injury, condition or abnormality that could explain respondent's continued complaints of pain. Dr. Minor pointed out that several MRIs, and an arthroscopic exploratory procedure by Dr. Jarrett,

found that there is no objective indication or sign of orthopedic injury or disability within respondent's left knee.

22. Dr. Minor opined that there are no specific job duties as a CO that respondent is unable to perform due to his previous left knee injury or lower back complaints. Dr. Minor acknowledged that there might be some duties respondent might find uncomfortable or difficult due to his claims of pain and swelling, such as prolonged standing or running, but none that he is substantially unable to perform due to any orthopedic condition. Dr. Minor concluded that applicant is not substantially incapacitated for the performance of his duties as a CO for CDCR.

23. Dr. Minor also testified in support of his IME findings and conclusions. Dr. Minor pointed out that there was no orthopedic evidence that supported a finding that respondent was substantially incapacitated in 2000-2001, just as there is no such evidence that he is substantially incapacitated now. He pointed out that the medical evidence, then as now, showed only a strain/sprain injury to respondent's knee, particularly revealed on the two MRIs, and especially Dr. Jarrett's arthroscopic examination, where Dr. Jarrett could find absolutely nothing orthopedically wrong with respondent's left knee, actually looking inside with an arthroscope. Dr. Minor opined the internal arthroscopic evaluation of respondent's left knee, finding no abnormality, should have been dispositive on any incapacity claim. Dr. Minor stated in his report, and testified:

Quite frankly I feel uncomfortable stating that this pleasant professional is capable of performing his usual duties given the fact that he has been medically retired for the last 10 years and has received a rating from Worker's Compensation. However, it should be noted that at the time of his injury he had two entirely normal MRIs. Ultimately he was seen by multiple orthopedic surgeons, and the last orthopedic surgeon on November 15, 2000, Jerald Jarrett, M.D., arthroscopically evaluated the knee and found absolutely no abnormalities within it. At that time, videos were taken of Officer Anglin. In those videos, it appeared that he was quite active on his knees. Subsequent videos have been taken that are not conclusive in any direction. However, had I evaluated him 10 years ago, it would have been my feeling that he should not be medically retired.

On today's evaluation he states that he has difficulties with the knee. He states he has painful popping within the knee and he also states the knee feels weak and gives out. He states that the knee swells and he notes difficulty with straight leg lift and bending forward. He states that with these two activities he has pain in the back of the knee. I am unsure why that necessarily causes pain in the back of the knee.

On physical examination, there was absolutely no crepitus of the knee. There was no effusion within the knee. We noted some loss of motion in the knee. He states that he could bend the knee more, however, it hurt more. Surprisingly, however, there was no atrophy of the thigh musculature, and as a matter of fact there appeared to be 16 mm increased girth on the left thigh compared to the right. Given the normal findings in 2000 and the unremarkable findings on physical examination today, with the increased girth of his left thigh, it is my feeling that he is certainly capable of performing the duties of a California Correctional Peace Officer.

Additional Medical Evidence Offered By Respondent

24. Applicant offered additional medical evidence at the time of the evidentiary hearing that included some recent medical evidence of treatment provided by Dr. Lentz for complaints of pain and swelling of his left knee, low back pain, and foot pain. Applicant's records from Dr. Lentz primarily focus on back pain and a referral to a podiatrist for the foot problem. Applicant also offered a copy of the IME reports of Dr. Shelub and Dr. Meadows that resulted in his Worker's Compensation award and, as noted above, the CalPERS disability retirement at issue here.

25. Dr. Minor was given an opportunity to review the medical records produced at the time of the evidentiary hearing. The only medical records not yet reviewed by Dr. Minor were those from Dr. Lentz. Dr. Minor testified that there was nothing in Dr. Lentz's records that would cause him to revisit or change his opinions and conclusions about respondent's lack of evidence of incapacity.

Analysis of The Medical Evidence of Incapacity

26. Dr. Minor was exceptionally credible and persuasive, both in his written report and in his testimony. Dr. Minor's opinions and conclusions that there is no medical reason why applicant is unable to perform his usual and customary duties stands unrefuted by any credible or persuasive medical evidence. Dr. Minor pointed out that there is no reason to disbelieve applicant's complaints of pain, discomfort and swelling in his left knee, especially with prolonged use, but there is also no orthopedic evidence whatsoever of any medical problem with his knee. Dr. Minor observed that subjective complaints of pain and discomfort without objective medical evidence of an injury or condition known to cause that pain or discomfort cannot form the basis for a conclusion of substantial incapacity.

27. Dr. Minor's analysis was devastating to the credibility and persuasiveness of the medical evidence upon which respondent was initially granted his disability retirement in 2002, particularly the IME report of Dr. Meadows. Dr. Minor was incredulous that Dr. Meadows could conclude that respondent was substantially incapacitated after reviewing two MRIs that showed no significant abnormality of respondents left knee, an exploratory

arthroscopic surgery that confirmed that there was no abnormality, and after having reviewed surveillance video that showed respondent performing his duties as a construction manager, including going up and down a ladder and stairs without apparent difficulty or problems with his gait. Dr. Minor pointed out that Dr. Meadows did respondent and the medical community who perform medical/legal evaluations a disservice by expressing a medical opinion completely refuted by the medical evidence he recited in his own report.

28. Dr. Minor's expression of concern and disappointment at having to opine as he did was compelling and troubling. The evidence supports only a conclusion that respondent was given a disability retirement in 2002 lacking substantial supporting medical evidence in support of orthopedic incapacity. Dr. Minor expressed concern that his conclusions mean that after depending upon a disability retirement for approximately a decade, this means of financial support to respondent and his family must be ended. Yet it must, as there is no medical or legal basis to permit it to continue. Dr. Minor convincingly placed the blame squarely where it belongs; upon a misguided medical evaluator doing respondent "no favors" by medically approving a benefit that should never have been provided. Continuing the benefit at a time when medical evidence still does not support the granting of the benefit in the first place only compounds the problem. As dissatisfying and troubling as such a conclusion may be, the fact of the matter is that there is not now and never was adequate and persuasive medical evidence to supports a conclusion that respondent was or is substantially incapacitated due to his orthopedic complaints from the performance of his usual and customary duties as a CO for CDCR.

LEGAL CONCLUSIONS

1. "Disability' and 'incapacity for performance of duty' as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion."⁷

2. "If the medical examination and other available information show to the satisfaction of the board ... that the member is incapacitated physically or mentally for the performance of his or her duties in the state service and is eligible to retire for disability, the board shall immediately retire him or her for disability...."⁸

3. "We hold that to be 'incapacitated for the performance of duty' within section 21022 means the substantial inability of the applicant to perform his usual duties."⁹ *Mansperger* continues to be the definitive statement of California courts to date regarding

⁷ Government Code section 20026, in pertinent part.

⁸ Government Code section 21156, in pertinent part.

⁹ *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App. 3d 873, 876.

the meaning of the language of section 21156 “incapacitated for the performance of duty,” in the context of an application for a disability retirement.

4. In applying the *Mansperger* standard, it has been held that the fact that a person has a limiting and painful physical condition, or an emotionally troubling psychological condition that limits, but does not preclude, the person’s ability to perform his or her usual duties; or makes performing the usual and customary duties of one’s occupation more difficult or unpleasant physically or mentally does not necessarily constitute a substantial incapacity for the purposes of a disability retirement.¹⁰ The fact that the physical or psychological condition may preclude the applicant from performing some but not all usual and customary job duties does not necessarily mean the applicant is substantially incapacitated within the meaning of *Mansperger* and section 21156.¹¹

5. CalPERS carried its burden of proof to prove by a preponderance of the evidence that respondent is no longer substantially incapacitated for the performance of his usual and customary duties as a CO with the CDCR, as set forth in the Factual Findings. The medical evidence does not support a claim of continuing substantial incapacity on the basis of the orthopedic condition of respondent’s left knee or low back, or both. There is no credible and persuasive medical evidence of orthopedic incapacity. As in *Hosford*, the fact that respondent’s complaints of pain and incapacity in his left knee and low back may make some of his customary duties as a CO more uncomfortable or difficult than those duties would ordinarily be does not equate to substantial incapacity.

6. There is no competent medical evidence that respondent continues to be substantially incapacitated, within the *Mansperger* standard. Furthermore, CalPERS successfully proved through Dr. Minor that there was no credible and persuasive medical evidence supporting the 2002 award of disability retirement. A disability retirement award on the basis of nothing more than subjective complaints of pain and discomfort, without objective evidence of any causative injury, abnormality or condition, opens the door to awarding benefits where there never has been any legislative expression of intention to benefit such a class of individuals. There is no option but to decide here in accord with the facts and the law. Respondent may not continue to receive a disability benefit for which there does not exist persuasive medical evidence to support it. There never has been a reasonable medical evidentiary basis for concluding that the orthopedic condition of respondent’s left knee and or his low back prevented him from substantially performing his usual and customary duties as a CO with the CDCR. Therefore, respondent’s appeal must be denied, and CalPERS’s previous grant of a disability retirement to respondent must be reversed.

7. Respondent contended that the determinations of his Workers Compensation case, finding him permanently disabled a rating of 19.5 percent should also result in a similar

¹⁰ *Hosford v. Board of Administration* (1978) 77 Cal.App. 3d 854, 861-863.

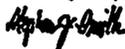
¹¹ *Id.*

conclusion here. The existence of a Workers Compensation finding or award of disability compensation is not determinative or even substantial evidence of substantial incapacity, as that term is defined in *Mansperger* and the many cases that follow its authority. The standards of proof required to demonstrate a compensable injury in the no-fault Workers Compensation system are significantly different than those required to meet the proof threshold for substantial incapacity, and thus eligibility for a disability retirement. The Workers Compensation and disability systems have different objectives and different mechanisms to evaluate what constitutes compensable injuries or conditions. Even a finding of permanent total disability under the Worker's Compensation standards does not necessarily equate to and require a finding of substantial incapacity in the disability retirement system. The nomenclature and the rating system of the Workers Compensation system for disability finds no parallel, and has no correlate, in evaluating whether a person is substantially incapacitated from the ability to perform their usual and customary job duties.

ORDER

The determination of the CalPERS Benefits Division that respondent is no longer substantially incapacitated from the performance of his duties is **AFFIRMED**. The appeal of William R. Anglin of the CalPERS determination that he is no longer medically eligible for a disability retirement is **DENIED**. Respondent's status as retired for disability is **TERMINATED**. Respondent shall forthwith be returned to work as a Correctional Officer with the California Department of Corrections and Rehabilitation-CCC-Susanville.

DATED: March 22, 2016

DocuSigned by:

25D4275E07F6463...

STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings